Supreme Court, U.S.
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No. 94-1395

In The

Supreme Court of the United States

October Term, 1994

JESUS HERNANDEZ and MARY HERNANDEZ,

Petitioners,

v.

BADGER EQUIPMENT COMPANY and CARDE PACIFIC CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California, Fourth Appellate District, Division One

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court should consider the case further, when no federal right is asserted and the Court is accordingly without jurisdiction?

2. Whether a state appellate court correctly applied a state comparative-fault statute to reduce an injured worker's non-economic damages by the percentage of his employer's fault, where, though the employer was immunized from suit by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, the case arose under state law, was denied review by the state supreme court, and involves no federal rights or issues?

3. Whether the state appellate court correctly interpreted the same state statute as applying to damages for loss of consortium, where the statute expressly lists loss-of-consortium damages among those damages to which it is applicable?

LIST OF PARTIES

Jesus and Mary Hernandez

National Steel and Shipbuilding Company

Badger Equipment Company

Carde Pacific Corporation

Carde Pacific Corporation has neither parent nor subsidiary companies. Badger Equipment Company (formerly known as Burro-Badger Corporation) has no subsidiaries; its parent company is Avis Industrial Corporation.

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OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One (Pet. App. 1-60), is reported officially at 28 Cal.App.4th 1791, and unofficially at 34 Cal.Rptr.2d 732. The superior court's judgment is attached as an appendix hereto.

JURISDICTION

This Court is without jurisdiction to review the state appellate court's decision. While petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1), that statute plainly pertains to decisions of the federal appellate courts. Jurisdiction over this case could be invoked only under 28 U.S.C. § 1257, which permits this Court to review state court decisions in three specific instances, none of which is presented here.

STATUTES INVOLVED

The relevant portion of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, is section 905(a), which reads as follows:

> **(a) Employer liability; failure of employer to secure payment of compensation**
>
> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and

anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

California Civil Code § 1431.2 provides as follows:

§1431.2 Several liability for non-economic damages

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including substitute domestic services, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

STATEMENT OF THE CASE

Respondents hereby incorporate by reference those portions of the court of appeal's decision set out at Pet. App. 3-8, 11-12.

Respondents also note, in compliance with Supreme Court Rule 14.1(h), that no federal questions are presented by this case.

REASONS FOR DENYING THE WRIT

The decision of the California Court of Appeal is correct, and does not conflict with any federal right asserted by petitioners. Therefore, and because this Court is accordingly without jurisdiction, further review is not warranted.

1. Noting that section 905(a) of the Longshore and Harbor Workers' Compensation Act (the "Longshore Act") (33 U.S.C. § 905(a)) prohibits any reduction in an employer's recovery of workers' compensation benefits paid an injured employee, even where the employer's negligence contributed to the accident (Pet. at 4), petitioners argue, citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), that an employee's award of non-economic damages cannot be reduced by the employer's percentage of fault in any Longshore Act case (Pet. at 5). This contention is incorrect. In *Edmonds*, a federal case brought in federal court under admiralty law, this Court held only that Congress had not meant, in enacting the 1972 amendments to the Longshore Act, either to alter the judicially-created admiralty rule that a third-party shipowner is responsible for all damages not due to plaintiff's own negligence, including those caused by the employer's negligence, or to impose a comparative fault system in place of that rule. Contrary to petitioners' contention (Pet. at 5, 6-7), this Court did *not* say that either it or Congress was opposed to a comparative fault system, no matter what the context; on the contrary, this Court noted that it had "recently acknowledged the sound arguments supporting division of damages between parties before the court on the basis of their comparative fault" (443 U.S. 271, citing *U.S. v. Reliable Transfer Co.*, 421 U.S. 397 (1975)), but concluded that Congress had not intended the 1972 amendments to change the existing admiralty rule. However, as the court of appeal herein correctly concluded, "nothing in *Edmonds* suggests the Longshore Act or judicially-created admiralty law precludes application of state comparative

fault doctrines in all cases involving payment of workers' compensation benefits under the Longshore Act" (Pet. App. at 17).[1]

The court of appeal's analysis of *Edmonds* was clearly correct. Application of Cal. Civ. Code § 1431.2 to petitioners' non-economic damages does not conflict with *Edmonds*. Further, as that court correctly concluded in rejecting petitioners' contention that the Longshore Act preempted section 1431.2, "[petitioners] have not identified any substantive federal right abridged by . . . application of section 1431.2" (Pet. App. at 21). Since no federal rights have been abridged here, this Court is without jurisdiction, and review is accordingly not warranted.

2. Petitioners next challenge the court of appeal's conclusion (Pet. App. at 22) that its prior decision in *Schreefel v. Okuly*, 143 Cal.App.3d 818, 192 Cal.Rptr. 402 (1983), did not hold that all California comparative fault laws are preempted in all Longshore Act cases (Pet. at 8). This contention improperly seeks to involve this Court in evaluating a state appellate court's interpretation of its own prior decision, and does not support this Court's intervention.

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[1] Indeed, this Court expressly noted that its decision "does not necessarily have any effect on situations where the Act provides the workers' compensation scheme but the third-party action is not governed by principles of maritime law." 443 U.S. at 732, n. 31.

Further, unlike the statute at issue here, the proportionate-fault rule under consideration in *Edmonds* would have reduced, by the percent of the employer's fault, not just the employee's non-economic damages, but his *entire recovery*.

3. Petitioners contend (Pet. at 8-10) that it is "inconsistent" to apply both state and federal law to their case, and that section 1431.2 is preempted by the Longshore Act. However, it is well established that, when Congress legislates in a field traditionally occupied by the states, such as common law tort remedies, there is a presumption against finding preemption (*California v. ARC America Corp.*, 490 U.S. 93, 100-101 (1989)), and that preemption will not be implied absent an *actual conflict* with a *substantive federal right* which Congress intended to create or guarantee. *English v. General Electric Co.*, 496 U.S. 72 (1990); *see Massachusetts Medical Society v. Dukakis*, 815 F.2d 790, 796 (1st Cir. 1987), *cert. denied* 484 U.S. 896 (collecting cases). Here, as the court of appeal correctly noted (Pet. App. at 21-22), petitioners have failed to identify any substantive *federal* right which was abridged by application of section 1431.2. As the court observed, petitioners sued in state court, on state law causes of action; they prevailed on state law theories, and were awarded state law remedies. The only federal right involved was that of the employer to recoup its workers' compensation payments, a right which was not abridged by application of section 1431.2. While petitioners' non-economic damages were reduced by application of that section, their "right" to those damages comes from state, not federal, law. Thus, since no substantive *federal* right was abridged by application of section 1431.2, the court of appeal's finding of no preemption was correct. This conclusion

was consistent with and compelled by established precedent, and requires no action by this Court.[2]

4. Petitioners contend that the court of appeal's decision is contrary to *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975), and that "equitable principles of fairness" preclude application of section 1431.2 (Pet. at 10-12). The court of appeal correctly noted that the *Dodge* decision is inapposite (Pet. App. at 17). *Dodge* was a federal case brought under the Longshore Act, and involved the Ninth Circuit's rejection of a third-party defendant's request that the court *impose* a comparative fault system where Congress had failed to do so. *Dodge* involved neither state law nor preemption principles. As for petitioners' equitable argument, the California Supreme Court has recognized that section 1431.2 will prevent some plaintiffs from recovering all of their non-economic losses, but held that this result is a legitimate consequence of that statute. *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1204, 246 Cal.Rptr. 629, 638-639 (1988). In sum, neither of these arguments would justify this Court's intervention.

5. Petitioners finally argue that the state court erred in interpreting section 1431.2 as applying to loss-of-consortium damages. The court of appeal rejected petitioners' arguments, in part because the statute *expressly*

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[2] The court of appeal noted that petitioners' award of *economic* damages was, consistent with federal law, *not reduced* by the employer's percentage of fault, and that their *non-economic* recovery would have been reduced *regardless* of whether state or federal law governed the employer's recovery of workers' compensation benefits (Pet. App. at 22-23 and notes 16 and 17).

includes loss-of-consortium damages in the definition of "non-economic damages" to which it is applicable (Pet. App. at 25; p.2, *supra*). Review of the state court's interpretation of state law is beyond this Court's jurisdiction. Review should accordingly be denied.

CONCLUSION

The decision of the court of appeal was correct, and, because the case presents no federal questions, review of that decision is beyond this Court's jurisdiction. The petition for writ of certiorari should accordingly be denied.

Respectfully submitted,

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March 17, 1995

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

JESUS HERNANDEZ AND MARY HERNANDEZ, Plaintiffs, v. BADGER CONSTRUCTION EQUIPMENT COMPANY AND CARDE PACIFIC CORPORATION, Defendants.	CASE NO. 613315 JUDGMENT (Filed Jul. 24, 1992)
AND ALL RELATED CROSS-COMPLAINTS AND COMPLAINTS IN INTERVENTION	

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

A. On Plaintiffs' Complaint:

1. That plaintiff Jesus Hernandez has sustained economic damages in the amount of $350,000.00 and non-economic damages in the amount of $500,000.00;

2. That plaintiff Mary Hernandez has sustained non-economic damages in the amount of $250,000.00;

3. That plaintiff Jesus Hernandez was 5 percent at fault;

4. That plaintiff-in-intervention NASSCO was 55 percent at fault;

5. That defendant Badger Equipment Company ("Badger") was 20 percent at fault;

6. That defendant Carde Pacific Corporation ("Carde") was 20 percent at fault;

7. That each defendant is only severally (and not jointly) liable for its 20 percent proportionate share of the non-economic damages;

8. That plaintiff Jesus Hernandez' award of economic damages from Badger and Carde shall be reduced by the $148,943.94 paid to him or on his behalf by plaintiff-in-intervention National Steel & Shipbuilding Company ("NASSCO") pursuant to the Longshore and Harbor Workers' Compensation Act;

9. That the economic damages of plaintiff Jesus Hernandez shall be reduced by his 5 percent fault;

10. That plaintiff Jesus Hernandez shall recover jointly and severally from defendants Badger and Carde the sum of $183,556.06, together with interest thereon at the rate of 10 percent per annum from November 5, 1991 until paid, and costs;

11. That plaintiff Jesus Hernandez shall recover separately from defendant Badger the sum of $100,000.00, together with interest thereon at the rate of 10 percent per annum from November 5, 1991 until paid, and costs;

12. That plaintiff Jesus Hernandez shall recover separately from defendant Carde the sum of $100,000.00, together with interest thereon at the rate of 10 percent per annum from November 5, 1991 until paid, and costs;

13. That plaintiff Mary Hernandez shall recover from defendant Badger the sum of $50,000.00, together with interest thereon at the rate of 10 percent per annum from November 5, 1991 until paid, and costs;

14. That plaintiff Mary Hernandez shall recover from defendant Carde the sum of $50,000.00, together with interest thereon at the rate of 10 percent per annum from November 5, 1991 until paid, and costs;

B. On NASSCO's Complaint-In-Intervention:

15. That NASSCO had paid $148,943.94 in benefits to or on behalf of plaintiff Jesus Hernandez as of October 30, 1991, pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et seq.;

16. That plaintiff-in-invention NASSCO shall recover from defendants Badger and Carde jointly and severally, the sum of $148,943.94, with interest thereon at the rate of 10 percent per annum from November 5, 1991 until paid, and costs on its complaint-in-intervention;

17. That NASSCO is not required to indemnify Carde for the amounts awarded to plaintiffs from Carde;

C. On Carde's Cross-Complaint For Declaratory Relief:

18. That NASSCO was obligated to have Carde named as an additional insured on NASSCO's liability insurance;

19. That NASSCO is responsible for any self-insured retention provision in effect in its policy on or

about June 5, 1989, the date of Jesus Hernandez's injury; and

20. That Carde shall recover its costs on its cross-complaint from NASSCO.

Dated: 7-24-92

/s/ Thomas O. LaVoy
THOMAS O. LaVOY
Judge of the Superior Court

THOMAS O. LAVOY

Dated: 7/2/92 SULLIVAN, HILL, LEWIN & MARKHAM

By: /s/ Jeffrey D. Lewin
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